

United States District Court Southern District of Texas

Case Number: H-04-2387

ATTACHMENT

Description:

☐ State Court Record ☐ State Court Record Continued

☐ Administrative Record

☐ Document continued - Part III of IV

☐ Exhibit(s) number(s) / letter(s) Exh # 103

Other: Pltf's First Amended Pet. Habeas Corpus

1 prisoner assaults generally in TDC, or do you think this is just
2 because it's rape or sexual assault?

3 A. I don't know that I know that. I find that the figures,
4 such as these, would suggest to me that there is a greater
5 tolerance for sexual assault than there is for physical assault.

6 MS. SALITERMAN: I would like to move the admission of
7 Plaintiffs' 7, 8, 9 and 10.

8 MR. YOUNG: No objection. To admissibility only.

9 THE COURT: They're admitted. While we're at it,
10 reference has been made by counsel to Exhibit 664 and 674 and
11 they have not been submitted, much less admitted.

12 MS. SALITERMAN: Yes. Thank you, Your Honor. Let me
13 present those -- one moment, please. I'm sorry, Your Honor.
14 I'm swimming in exhibits. May I approach, Your Honor?

15 THE COURT: You may.

16 MR. YOUNG: No objection to 664.

17 THE COURT: It is admitted.

18 MR. YOUNG: No objection to 665. No objection to 666.

19 No objection to 667 or of 668. No objection to 669. No

20 objection to 670 through 674.

21 THE COURT: They are admitted.

22 BY MS. SALITERMAN:

23 Q. And you're looking at this problem of -- well, let me

24 backtrack. Do you have any other specific examples on safety

25 protection that you would like to discuss and which you base

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1 your opinion that there is a serious disregard for the risk of
2 harm to prisoners within TDCJ?

3 A. In a relationship I guess to what we were talking about in
4 terms of rape kits, I did interview an individual by the name of
5 Billy Kincaid, Number 613359. Billy had at one point been in
6 safekeeping at Beto Unit, and then was removed from there in May
7 of 1998. On May 1st, I might add, he had been removed earlier
8 but had filed in late April a grievance requesting protection
9 and a safer situation. He subsequently then was removed from
10 his safekeeping status. And then literally two days later one
11 of the inmates that had earlier been threatening him, throwing
12 scalding water at him while he was in his cell, and -- he
13 initially was placed back in safekeeping but then taken off for
14 fighting. Safekeeping, of course, in Texas is not as defining
15 as it is in many other institutions. Safekeeping individuals,
16 at least historically for the last several years, although have
17 this housing one could call a protective level of housing are in
18 general population for the purposes of programming, whether it

19 be education, work or eating or recreation. This was confirmed
20 by the medical department.

21 He then again asked for safekeeping, again was denied,
22 and was raped by two inmates. And at the time was both denied
23 medical and at no time was submitted to a rape test with a rape
24 kit.

25 Q. You mentioned, by the way, that he filed a grievance. And

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1 was this the first notice to TDC of his feeling that he was at a
2 risk of harm?

3 A. No, actually he had been in safekeeping earlier at the Beto
4 Unit and subsequently released from safekeeping. Then after
5 being threatened, filed -- had verbally requested protection.
6 And when he got what he felt was not an adequate response, filed
7 a grievance related to it.

8 Q. I think in these documents there are examples of grievances
9 in one of the plaintiffs' exhibits. Would you just tell us
10 briefly what filing a grievance means and who sees it and where
11 it goes?

12 A. Well, the grievance would normally be the process that an
13 inmate in any correctional system would use to make the system
14 aware of what the inmate observes as a failure of a system to
15 work or of a failure of the system to provide them those things
16 they are due.

17 In this particular instance, the inmate, if he felt
18 that he -- that people had not followed the proper procedure in

19 recognizing his request for a protection, would use the
20 grievance to make his problem known and filing such a grievance,
21 the grievance would go to a grievance officer who in theory
22 would investigate that and then respond in kind with whatever
23 the solution to that grievance would be.

24 Q. Now, you said in theory. What do you mean by that?

25 A. It appears in some instances of the many records I reviewed

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1 that many grievances are not investigated or are not thoroughly
2 reviewed. In fact, in many instances there are responses that
3 seem to be simply Xeroxes or standard stock responses to a
4 variety of kinds of grievances.

5 Q. And when you say not many, of all -- could you give the
6 Court an estimate of how many different prisoner files you
7 reviewed in your tour of those 16 units?

8 A. During the period of tours, I would guess it would have
9 reached a minimum of 25 per unit, and 16 -- roughly 16 units, so
10 300. And then I have reviewed other prisoner files subsequent
11 to that.

12 Q. Okay. And how would you characterize the responses to
13 grievances that you reviewed in that more than 200 files?

14 A. Unfortunately, I think - as I found during a couple of
15 things during my interviews with inmates - that there is almost
16 a universal distrust of the grievance system, which is
17 unfortunate, because it does need reasonable credibility if it's
18 going to accomplish what I'm sure TDCJ wants it to accomplish.

19 But the belief is, in many instances of many inmates I
20 interviewed and at looking at files, that there is no use in
21 filing a grievance because you're simply going to be denied
22 anyway.

23 MS. SALITERMAN: And if I may approach, Your Honor.

24 THE COURT: You may.

25 BY MS. SALITERMAN:

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1 Q. I would like to show you Plaintiffs' 48. Let me represent
2 that this document was produced as an example of a unit's
3 response to grievances. You testified that there were stock
4 answers to grievances that seemed to be copied or just retyped.
5 Is that Plaintiffs' 48 an example of the kind of stock answers
6 you observed looking through all of those files?

7 A. It absolutely does.

8 MS. SALITERMAN: I move its admission, Your Honor.

9 MR. YOUNG: No objection.

10 THE COURT: It is admitted.

11 MS. SALITERMAN: And I would also -- if I could
12 approach again.

13 BY MS. SALITERMAN:

14 Q. Let me show you a copy of what's going to be marked as
15 Plaintiffs' 15, not 1, protective custody and safekeeping beds
16 as of December 1, '98. And you testified about prisoners,
17 including the last gentleman, being moved in and out of
18 safekeeping. And does that exhibit reflect what you know to be

19 more or less the number of safekeeping beds in TDCJ at the time?

20 A. It does.

21 Q. And how many safekeeping beds are there in the entire

22 system?

23 A. This particular document would suggest that as December 1,

24 1998, there were 2,592 safekeeping beds.

25 Q. Out of a total population of what?

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1 A. 143,803.

2 Q. There is also a code called PC and you've mentioned
3 protective custody. What is protective custody and how does it
4 compare with safekeeping? What kind of categories of housing do
5 those two classifications offer?

6 A. Generally, protective custody would be described as the
7 individual being housed and treated in a manner that offers him
8 whatever protection he needs but generally complete protection.
9 It would generally be -- not always, but generally be in a
10 setting such as an administrative segregation, which is where it
11 happens to be with TDCJ. The beds that they can be protective
12 custody beds are found generally in their administrative
13 segregation units and they're for the most part individuals who
14 are fully restricted in terms of movement and access to other
15 people.

16 Safekeeping in the Texas vernacular is a housing
17 status. It's an attempt to place an individual who they
18 identify as having safety needs in a safe housing situation.

19 Historically, I think as I mentioned before, however, it's a bit
20 unusual because they frequently -- a person does everything else
21 in general population, including, eating, recreation, going to
22 school, work, et cetera.

23 It's my understanding that TDCJ is attempting and
24 possibly may have already implemented the possibility of placing
25 safekeeping beds in other units that can be more fully

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1 controlled and look like the more standardly accepted level of
2 protection for such inmates that have that need.

3 Q. Now, the number of TDCJ prisoners as of December '98 in
4 protective custody is what? What's the number on that?

5 A. Excuse me?

6 Q. In protective custody, how --

7 A. 100 -- this is listed by beds available. It says 128. I

8 recall from the National Council of Crime and Delinquency
9 reported that number, and I believe it was in October, was
10 around 70.

11 Q. So you recall that the actual number of prisoners with
12 protective custody status was 70, but this shows there are
13 additional beds, so they could put up to 128 beds in that
14 status?

15 A. Apparently so.

16 Q. In your experience throughout all the other prison systems
17 that you visited, what -- is this a high number, a low number?

18 Do you have an opinion about this in comparison to the

19 population of 144,000?

20 A. When I saw this figure and understood safekeeping and
21 protective custody as defined by TDCJ, I was a bit surprised.
22 First of all, I admire a system that tries to limit the
23 necessity for putting people in protective custody. It's very
24 -- in my opinion, a very inhumane situation. But there are
25 those people that need that protection. I find for a population

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1 of 143,000 that to only have 128 PC beds - protective custody
2 beds - is surprisingly low, in my opinion, compared to systems
3 that I've seen.

4 The 2,592 safekeeping beds also I think are quite low
5 for the population of 143,000, particularly as they historically
6 have been operated as not being protective in the full sense of
7 the word.

8 Q. What is the use of protective custody? What's the
9 relationship between having more people in protective custody
10 and preventing the vulnerable and weak and the kinds of
11 prisoners you have described from sexual and other assaults in
12 the system?

13 A. Well, I would agree with what I would observe as being one
14 theory of TDCJ, that whenever possible if it's in a
15 situation that the protection need is due to a predator, your
16 preference is to lock up the predator, not the victim. But the
17 vulnerable people, frequently there are too many potential
18 predators to do that. And there are enough of those people in

19 the system that I find this -- in any system find this a
20 surprisingly low number, which would suggest that if you don't
21 make the beds available, you are going to have to minimize the
22 number of people you place in that status, and I believe we saw
23 from figures produced by TDCJ both per Unit Classification
24 Committee denials as well as the state classification committee
25 denials, that the denials are significantly greater in number at

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1 the UCC level certainly than those that are accepted.

2 Q. And you said that the UCC is the unit classification body,

3 and then those decisions are reviewed by a systemlike body

4 called the FEC?

5 A. That is correct.

6 THE COURT: Called the what?

7 THE WITNESS: It's called the State Classification

8 Committee.

9 THE COURT: Thank you.

10 MS. SALITERMAN: SCC. Sorry, I think I misspoke.

11 MS. SALITERMAN: Your Honor, I would present another

12 document or --

13 THE COURT: Yes, go ahead. While we're waiting, you

14 made mention of the fact that these reported incidents is a

15 great -- or astonishingly low considering the prison population.

16 Is there -- insofar as you know, has there been any study as to

17 what the usual number of sexual assaults are in prisons

18 throughout the United States per hundred or per thousand or

19 whatever?

20 THE WITNESS: I don't know of anything that I would
21 consider to be trustworthy, Your Honor. There are reporting
22 mechanisms. There are some little booklets that come out
23 annually from the Criminal Justice Institute. The problem is
24 that they contain self-reported data from each state
25 jurisdiction, and depending on how good the state's reporting

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1 procedures are affects that.

2 THE COURT: I see.

3 THE WITNESS: However, I think what we can say is I'm
4 sure as acquainted you have been in the years over prison life,
5 that sex in prisons, and particularly the threat of violence in
6 order to obtain that sex, is not an uncommon kind of situation.
7 And that rapes, and particularly I think in male prisons, but
8 it's true also in women prisons, albeit common problem is not
9 the correct word, but uncommon is the correct word for there
10 being a rather frequent incidence of it.

11 THE COURT: All right. We'll have the morning recess
12 at this time. The Court will be in recess for 15 minutes.

13 (Recess at 10:30 a.m., until 10:45 a.m.)

14 THE COURT: You may resume your direct examination.

15 MS. SALITERMAN: Thank you.

16 CONTINUED DIRECT EXAMINATION

17 BY MS. SALITERMAN:

18 Q. Mr. Riveland, in -- I would like to leave the safety area,

19 but I would like to ask you one final question. Were -- when
20 you were at the 16 units, did you make any attempt to find out
21 if the unit kept any information on what happened to prisoners
22 who had requested some sort of protection or safety and it was
23 denied?
24 A. We did. And it was somewhat ironic. At the first unit
25 that I visit, Coffield, it turned out that -- that the -- what

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1 is required by policy and procedure, the emergency housing log
2 had not been maintained for some extended period of time -
3 several months - and that an attempt had been made to catch it
4 up - I believe it was in February of 1998 - and you could see
5 that there were literally several sheets with the same identical
6 handwriting writing everything in for that period of time and
7 still left three months vacant with no entries as to who had
8 requested emergency housing. Subsequent units that we
9 approached, though, generally did have such logs, and -- and we
10 were able to observe them in -- in subsequent units.

11 THE COURT: Well, did -- did the regulations call for
12 them?

13 THE WITNESS: They did, Your Honor.

14 BY MS. SALITERMAN:

15 Q. Are the logs the -- do they -- if they're adequately kept,
16 are those all the requests for safekeeping and -- or protection,
17 or some help from being victimized by another inmate?

18 A. The policy would suggest that it should be all of the

19 requests. The reality is, in simply from interviewing inmates,
20 that that certainly is not the case.

21 Q. And if the unit keeps the tally on the requests, did you
22 attempt to find out if the unit kept any information on what
23 happened to requests that were denied?

24 A. On such a log there is a -- a recording of -- there is to
25 be recorded the -- what the request is, what the problem is, and

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1 the reaction or the response of the Unit Classification

2 Committee to that request.

3 Q. Okay. And if that request is denied, is there any

4 procedure in the unit in which they track what happens to the

5 prisoner in the subsequent month, six months, year, having

6 denied the request for protection?

7 A. At the time that I requested the information, there --

8 there did not appear, at least I was told there was no such

9 tracking at that point in time. Subsequent to that and

10 subsequent, I believe literally within the last few weeks, there

11 has been some information generated like that, but it was not

12 available upon request at that time.

13 Q. And by that are you referring to a defendants' exhibit

14 that's been marked in this hearing -- for this hearing?

15 A. That is correct.

16 Q. Have you seen any information other than exhibit or

17 exhibits marked by the defendants?

18 A. I have not.

19 Q. Thank you. Do you have any explanation what might be
20 contributing to this serious disregard of risk of harm -- of
21 serious harm to prisoners within TDC when they need or should be
22 identified as needing protection from assault, victimization and
23 so on?

24 A. I think one contributing factor certainly is the avenues
25 available for the inmate to communicate to staff what their

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1 problems are, whether the problem is being threatened or some
2 type of a fear that the inmate has. One of the things I found
3 quite interesting and alarming, quite honestly, is that
4 apparently in 1995 the Legislature did not appropriate the funds
5 to continue what at that time were called classification
6 counselors, and literally several hundred classification
7 counselors statewide were eliminated. In almost every prison
8 system that I'm aware of, a position like the historical
9 classification counselor exists and in effect not only is
10 responsible for the inmate's classification and processes
11 regarding their classification, but frequently is an advocate
12 for the inmate and certainly is seen as a neutral person by
13 inmates as one that they can communicate their concerns to. The
14 elimination of these positions in this system, I think -- and I
15 might add that it -- it obviously was not TDCJ that chose to do
16 this. I've heard a number of staff around the system talk about
17 the value that existed. Frequently that counselor position is
18 the one that balances the ultra needs of custody and security

19 people with some concern for the individual inmate. The absence
20 of that person I think also affects the concerns about safety
21 and the avenues the inmate has to deal with safety issues.
22 Q. So if I understand you, the elimination of these positions
23 meant that there's no one within the unit who can know the
24 prisoner personally and understand his -- whether there's a
25 validity to his need for some sort of help or protection?

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1 A. I think there's very few. I -- I -- it seems to me that
2 several things contribute to that problem, the -- the fact that
3 on most units that -- that housing officers, correctional
4 officers that are stationed in housing units, are rotated
5 regularly to different posts throughout the wing and creates a
6 disincentive for correctional officers to get to know the
7 inmates and for the inmates to get to know them. The absence of
8 the classification counselor simply adds to that problem. And a
9 major communication gap, I -- I believe, is created,
10 contributing to safety problems.

11 MS. SALITERMAN: If I may approach, Your Honor.

12 BY MS. SALITERMAN:

13 Q. I would like to show you what's been marked as Plaintiffs'
14 11, Unit Classification Staff, 9 - excuse me - 1995 and 1998.
15 And, Mr. Riveland, if you would look, the number of
16 classification positions in 1995 is how many?

17 A. This document would indicate 328.

18 Q. And that's serving a prison population of what size?

19 A. Of -- serving 76,406.

20 Q. And in -- as of September 1998 --

21 A. I would say --

22 Q. -- how many classification counselors positions?

23 A. 61.

24 Q. And --

25 A. With a population that states here of 76,328, but that has

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1 to be wrong.

2 Q. That -- that's wrong. Right.

3 A. It has to be in the 140,000s.

4 Q. Thank you.

5 MS. SALITERMAN: I will, at this time, not move that
6 in admission; and we'll prepare a corrected exhibit.

7 BY MS. SALITERMAN:

8 Q. It -- now, have you seen any documents or reviewed any
9 testimony by the defendants' expert, Mr. DeLand, as to who else
10 within the unit might be helping perform the classification
11 counselors' role?

12 A. I did read the deposition of Mr. DeLand and suggested in --
13 in his report that -- excuse me. I read it in his report. In
14 his report he suggested that a number of other positions assume
15 the duties, including some by correctional officers, some by
16 people who work in the count room and some by chaplains. I find
17 that highly unusual, and it doesn't really get to the issue I
18 have with the problem. There basically on most units is a

19 singular chaplain who can't serve 2,000 or, in some cases, 4,000
20 people the role I'm suggesting. The count room people basically
21 are clerical persons who keep track of the placement of people
22 within the institution are neither professionally trained to
23 handle communication issues nor do they even have access in most
24 instances. And the correctional officers both have a lot of
25 duties to perform as well as frequently are not highly trained

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1 in trying to do that, and then it's confused by this rotating
2 staff issue. And I -- I'm still left with the premise that a
3 big gap in providing a safe environment for inmates is that they
4 simply do not have an adequate avenue of communication to
5 express their safety concerns.

6 Q. What role did the count room personnel play in the
7 classification process?

8 A. Basically once the -- the determination of the Unit
9 Classification Committee is made as to the custody level and
10 the -- the general housing assignment that the inmate should go
11 to, they determine such things as, does the person -- do we have
12 to put them in a lower bunk for whatever reasons, and if so,
13 here are the lower bunks available. They literally have little
14 trinkets, if you will, that hang on a hook, and -- and they
15 determine what inmate will be housed in what particular cell or
16 what particular bed given the conditions that have been laid
17 down by the Unit Classification Council -- Committee.

18 Q. And -- and do they have any personal information about --

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19 other than what's written in the record about these prisoners?

20 A. No personal information, no.

21 Q. So it's a -- more of a clerical or administerial function

22 they perform?

23 A. That is correct.

24 Q. Okay. Thank you. Earlier you testified that you looked at

25 conditions in administrative segregation in the Estelle Unit and

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1 all the administrative segregation facilities in the prisons you
2 visited?

3 A. That is correct.

4 Q. Did you form an opinion about the operation and -- and the
5 actual implementation of administrative segregation programs
6 within Texas prisons?

7 A. I was -- yes, I did. Several, actually.

8 Q. Would you provide us with those opinions?

9 A. First of all, particularly in the Level 2 and Level 3
10 sections of administrative segregation, I was absolutely amazed
11 at the stark and severe conditions that are imposed on inmates
12 in those particular levels.

13 Q. Could I just interrupt you? Would you explain what these
14 levels are? I mean --

15 A. Texas administrative segregation consists of -- in recent
16 years of three levels. The Level 3 is the most severe and
17 according -- although policy would allow an inmate to be placed
18 by the local committee in any one of the three, most units I

19 visited I was told that people generally start out in Level 3.
20 Level 3 is an extremely highly restricted area with arguably, in
21 my opinion, even some human necessities removed from the inmate.
22 The inmate, for example, is not allowed to have shampoo. He's
23 allowed only to have the personal hygiene items that are
24 provided by the State, is limited to any access to literature
25 and materials from the library. Level 3 is one of the three

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1 levels. The other levels progressively supposedly being --

2 offering more privileges as one moves through them. Level 2

3 having a bit more recreation time, a bit more option for

4 property, but not much.

5 Q. Let me interrupt you. Do you recall how many hours out of

6 cell for recreation Level 3 prisoners get?

7 A. As I recall, Level 3 is an hour a day three times a week.

8 Level 2 is five -- an hour a day five times a week and Level 1

9 an hour daily, seven days a week, is -- is my recollection.

10 Q. And so for Level 2, it's three hours a week out of cell

11 time?

12 A. That's my recollection.

13 Q. And you said that you understood that a prisoner

14 automatically goes into Level 3 when he's classified to go into

15 ad seg. From whom did you hear this?

16 A. It isn't automatic. The policy would allow the local

17 committee - the administrative segregation committee - to place

18 them in whatever level they choose. I was told by a variety of

- 19 staff, as I visited ad seg, that they generally start the person
20 out in Level 3. This varied from majors to ad seg lieutenants.
21 Q. All of whom said they invariably start on Level 3.
22 A. Yes.
23 Q. And did you -- for how long does this prisoner remain in
24 Level 3 before there's any review of changing the level?
25 A. Generally, as I recall by policy, they would only have to

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1 be there 90 days. The experience of those I talked to is they
2 tend to be there longer. In some instances very much longer.

3 Q. And I interrupted. You were describing the deprivation in
4 Levels 3 and 2. I didn't -- I think I interrupted your
5 testimony.

6 A. Well, Level 3, for all practical purposes, then, is an
7 individual who is not allowed to have property other than
8 state-issued hygiene, to exclude, I might add, shampoo. And I
9 find it amazing that we can find a correctional purpose for
10 denying somebody shampoo.

11 THE COURT: What was the purported reason; do you
12 know?

13 THE WITNESS: What has been told to me is that it's so
14 important to -- that people who are in -- who may be placed in
15 administrative segregation know that they are going to be
16 deprived of what I would suggest even our normal human needs
17 kinds of issues, that I guess there's a fear that should set
18 into their mind that they will improve their behavior. I'm not

19 sure that I follow the logic very well, but it's the most
20 drastic I have seen and -- and having been in the major super
21 maxes around the country I was a little surprised to find it in
22 what is in an administrative segregation unit, not a punitive
23 segregation unit.
24 BY MS. SALITERMAN:
25 Q. So when you compare the Level 3 and Level 2 administrative

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1 segregation in Texas, how does that compare with the
2 restrictions in the super maxes you visited elsewhere?
3 A. In most of the super maxes that I visited, with the
4 exception of very small numbers of inmates who have continued to
5 be assaultive and for a period of time have to be locked down in
6 severe conditions, there's some attempt made, first of all, to
7 keep property levels fairly high. I might add that Pelican Bay,
8 which is -- has a notorious reputation and finally resolved
9 litigation through an agreed upon order, allows in many of its
10 segregation cells, its super cells max, televisions - personal
11 televisions - let alone a wide range of reading materials, and
12 certainly allows people to buy from the commissary. Now, there
13 are small numbers of people they may restrict from that, but
14 that's based on behavioral acting out, not on a general
15 condition.

16 Q. And did you observe the implementation of what limited
17 opportunities Level 2s and 3s have for recreation?

18 A. I did.

19 Q. Okay. And what is the -- where do they recreate? Indoors?

20 Outdoors? Out in --

21 A. In -- in most instances in the units that I visited, the ad

22 seg people recreate in a cage that's -- cages that are located

23 outside of the segregation building. They're locked

24 individually in those cages after being moved there in

25 restraints and moved back in restraints.

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